

Legal protection for the Patent Registered by A Foreign Citizen in Indonesia Pursuant to the Law Number 13/2016 on Patent

Monalisa Lucky Maria Sinurat

Email: monalisalms17@gmail.com

Universitas Sumatera Utara

ABSTRACT

The registration of patent in Indonesia give a positive value to Indonesia's economic growth because the bigger the number of patents in a country the higher the country's capability to innovate. The government issues Law number 13/2016 on patents in order to protect the patents which have been registered in Indonesia so it is expected to motivate inventory, especially foreign citizens. In practice, those foreign citizen consider that article 20 of the Patent Law is a constraint because they are obligated to make products or follow the process applied in Indonesia, support the technology transfer, absorb the investment, and/or provide employment. Article 20 of patents law is also considered to violate the TRIP's provisions. The government amends the patent law by issuing Law Number 11/20 on Job Creation but it crates a different positive law that is applied in Indonesia. The research problems are how about the development of invention registration for foreign citizen in the Directorate General of Intellectual Property during that last years, how about the benefits of giving legal protection for foreign citizen's invention in Indonesia on Indonesia's economic growth, and how about the legal implication ow Law Number 11/2020 on Job Creation on Patent Law, especially in relation to the grant of a patent for the invention of foreign citizen in Indonesia. The research method used is juridical normative method with a descriptive analytical approach and the source of data is secondary data. The data collection technique is library research. The data are analyzed qualitatively and are obtained from the research result using deductive method. The result indicates that there is an increase by 25% in 2020. The legal protection for patents registered by foreign citizens can increase Indonesia's economics condition due to employment opening, and an increase in knowledge and skill of Indonesias society. The application of Job Creation is considered not incaccordance with article 28 C Paragraph (1) of the Constitution of the Republic of Indonesia as the goal and purpose of forming the country.

Keywords : Patent, Invention, Inventor, Patent Registration

INTRODUCTION

Along with the times, humans are required to be able to use ideas from a science of technology that can be poured into a work and formulated as an object of intellectual property in the field of technology called patents where legal protection is contained in international law and national law through Law of the Republic of Indonesia Number 13 of 2016 concerning Patents. Based on the provisions of Article 1 point 1 of the Patent Law, it is stated that a patent is an exclusive right granted by the state to inventors on the results of inventions in the field of technology for a certain period of time to carry out the invention itself or give approval to other parties to carry it out. A patent protection right is given to inventors for their inventions in order to motivate inventors to improve their work both in quantity and quality so that it is expected to be able to encourage the welfare of the nation and state and create a healthy business climate. In Law of the Republic of Indonesia Number 13 of 2016 concerning Patents, the State of Indonesia not only provides legal protection for domestic patents, but also provides patent legal protection for foreign inventors whose registration is carried out in Indonesian territory.

In technological developments that are always moving forward, Indonesia as one of the developing countries still depends on mastering technology in developed countries so that it requires human resources who are experts in technology and able to provide technology

transfer from developed countries. This is in line with Article 20 of the Patent Law which states that patent holders are required to make products or use processes in Indonesia by supporting technology transfer, investment absorption and/or employment provision. However, Article 20 of the patent law is considered an obstacle for patent holders who are Foreign Nationals because it is considered an obstacle in implementing patent production in Indonesian territory.

METHODS

This type of research is normative juridical which refers to legal norms contained in laws and regulations. The nature of research is descriptive analytical that seeks to tell the solution of existing problems based on data. The technique used to collect data in this study is the library research method, which is research carried out using literature, both in the form of books, notes, and reports on the results of previous research. The data analysis used in this study is qualitative data analysis to obtain previously unexpected discoveries and to form new theoretical frameworks, and the data helps researchers to move ahead of the initial preconceived notions and frameworks.

RESULTS AND DISCUSSION

Results

Number of Applications for Registration of Inventions From Foreign Nationals at the Directorate General of Intellectual Property in the last Five Years

Patent registration that provides legal protection in it explains that patent protection as a form of prevention (preventive) so that other parties do not commercially exploit an invention, thus inventors or patent holders can take economic benefits from the invention. Legal protection provided by the state must be able to guarantee legal certainty. Based on Utrecht's theory, legal certainty makes individuals know what actions can or cannot be done, as well as being legal security or avoiding government arbitrariness because they know what the State can charge or do to individuals. Indonesia must establish a patent system and strive to provide its legal protection as well as possible, because it is part of the investment climate desired by foreign parties.

Based on data from the Annual Report of the Directorate General of Intellectual Property, patent applications in the territory of Indonesia from 2016 to 2020 are as follows:

1. In 2016 foreign patent applications in Indonesia reached 3304 applications including patent applications and simple patents as many as 1,059 applications and 2,245 applications for registration through PCT, while domestic patents amounted to 405 applications;
2. In 2017 foreign patent registrations in Indonesia in 2017 reached 4,725 applications including patent applications and simple patents as many as 1,537 applications and 3,188 applications for registration through PCT, while domestic patents amounted to 574 applications;
3. In 2018 foreign patent registrations in Indonesia in 2018 reached 5,905 of which were patent applications and simple patents as many as 1,867 applications and 4038 applications for registration through PCT, while domestic patents amounted to 794 applications;
4. In 2019 foreign patent registrations in Indonesia in 2019 reached 9,903 of which were

- patent applications and simple patents as many as 1,556 applications and 8,347 applications for registration through PCT, while domestic patents amounted to 1,298 applications;
5. In 2020 Foreign patent registrations in Indonesia in 2020 reached 7,420 of which were patent applications and simple patents as many as 890 applications and 6530 applications for registration through PCT, while domestic patents amounted to 1,216 applications.

Benefits for Economic Growth in Indonesia by Providing Legal Protection to Foreign Inventors in Indonesian Territory

Indonesia as one of the developing countries that still depends on the technological capabilities of developed countries expects continuous opportunities for technology transfer from foreign investors, so it is the obligation of the state to provide legal protection to foreign inventors in Indonesian territory to be willing to register and carry out their inventions in Indonesian territory. The Patent Law in force in Indonesia not only provides legal protection for domestic patents, but also provides legal protection for foreign patents whose registration is carried out in Indonesian territory.

Indonesia as a member of the World Trade Organization (World Trade Organization) has an impact on the provisions contained in patent regulations in the territory of Indonesia because each WTO member follows every agreement that has been agreed, one of which is related to TRIP's (Trade Related Aspect of Intellectual Property Rights). The impact in question is that regulations related to patents must be aligned with the policies contained in TRIP's and through Presidential Decree No. 16 of 1997 has been ratified Patent Cooperation Treaty (PCT) and Regulations under PCT. The policy alignment aims to increase patent applications in Indonesia for both domestic and foreign patents that want their inventions to be safely entered and accepted by the public.

Foreign patent holders who register and execute their patents in Indonesia give positive value to economic growth in Indonesia because foreign nationals contribute to science and technology in Indonesia. Furthermore, the enactment of the provisions of the Patent Law which regulates the obligation to execute patents in Indonesia has a positive value towards increasing investment provided by foreign patent holders through the development of new business sectors. The development of new sectors in Indonesia has an impact on increasing Indonesian state revenue, because the new business sector will become a tax object, where tax is one of the sources of state revenue, so that the more new business sectors that grow as a result of the implementation of patents, the source of state income will increase and the business sector that grows from the implementation of these patents will absorb a lot of labor.

This absorption of labor occurs when in the production stage human resources are needed to help the production process of the patent, so that it can be one of the solutions to reduce the number of unemployment in Indonesia. As long as Indonesian workers who work in the new business sector carry out these foreign patents, it provides opportunities and opportunities to be able to take knowledge from their participation in implementing these foreign patents. so that if at the time the patent protection period has expired, then Indonesian workers can apply the knowledge that has been absorbed to make new innovations in the field of technology and is expected to be able to create new inventions that can contribute useful

knowledge and provide new jobs for the people of Indonesia.

The business sector that implements the Patent can also improve the welfare of other parties through business cooperation with local companies in Indonesia and optimize the use of natural resources in Indonesia, as raw materials for inventions produced during the implementation of the Patent. With the transfer of technology or transfer of technology from intellectual property owned by foreign countries and developed countries to be applied in Indonesia, it is expected not only to include the transfer or entry of technology from one country to another, but also regarding the ability to understand, utilize, master and develop it. The State of Indonesia in providing legal protection to Foreign Nationals who register their inventions in Indonesian Territory by considering the theory of legal expediency. The theory of legal expediency stated by Jeremy Bentham, which is to provide as much benefit and happiness as possible to the citizens of society is based on a social philosophy that reveals that every citizen desires happiness, and the law is one of the tools.

Legal Implications of the Enactment of Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation on the Patent Law, especially related to the granting of patents for the invention of Foreign Nationals in Indonesia

Legal norms are inseparable from the refinement of applicable laws and regulations in Indonesia, one of which is the formulation of the Job Creation Law. The government issued Law Number 11 of 2020 concerning Job Creation in which this Law was born as an effort to respond to the need for legal certainty in the investment sector in Indonesia as well as an effort to overhaul the Articles in various laws through 1 (one) law as stated in the Academic Paper of the Job Creation Law. In the Job Creation Law, there have been changes to Law Number 13 of 2016 concerning Patents, namely in Article 3, Article 20, Article 82, Article 122, Article 123, Article 124. Changes to several articles in the Patent Law are based on the fact that the Job Creation Law requires an ease of doing business in Indonesia because patent regulations are considered to hinder the implementation of ease of doing business for patent holders.

Changes in obligations that have received attention from the Indonesian people are Article 20 of Law Number 13 of 2016 concerning Patents which was amended through the Job Creation Law. Article 20 of Law Number 13 of 2016 concerning Patents is considered difficult for Foreign Nationals who want to register their patents in Indonesia because they are obliged to make products or use processes in Indonesia and support technology transfer, investment absorption and create jobs for the community, if they do not meet these rules then the patent is not recognized in Indonesia, even if the patent holder does not exercise or violate these provisions then according to the Patent Law on Article 132 paragraph (4) states that prosecutors or other parties representing national interests have the right to file a lawsuit for patent deletion against patent holders or licensees-compulsory to the Commercial Court.

In addition, Article 130 states that after a court decision, it has permanent legal force. This makes foreign nationals feel difficult and reluctant to open a business or invest in Indonesia, so with changes to Article 20 of the Patent Law in the Job Creation Law, it is expected to be able to solve these problems. Article 20 of the Patent Law is also considered incompatible with TRIP's agreement because TRIP's does not allow discrimination. Based on this, the Government of Indonesia tries to respond by providing a middle way by changing the obligations of patent holders through the Job Creation Law. The Job Creation Law in Article

107 in provision 2 (two) contains changes to the phrase Article 20 of the Patent Law where in this case the provisions in Article 20 of the Patent Law change to:

1. Patents must be implemented in Indonesia;
2. The implementation of patents as referred to in paragraph (1) is as follows:
 - a. Pelaksanaan paten-produk yang meliputi, membuat, mengimpor atau melisensikan produk yang diberi paten;
 - b. Pelaksanaan paten proses yang meliputi membuat, melisensikan atau mengimpor produk yang dihasilkan atau yang diberi paten; atau
 - c. Pelaksanaan paten-metode, sistem dan penggunaan yang meliputi, membuat mengimpor atau melisensikan produk yang dihasilkan dari metode, sistem dan penggunaan yang diberi paten.

Article 107 of the Job Creation Law can be interpreted to mean that there is a deletion of the provision of technology transfer obligations in the case of granting patents in Indonesian Territory where the Patent Law emphasizes that "Patent Holders are required to make products or use processes in Indonesia and must support technology transfer, investment absorption and/or employment provision".

Discussion

Based on patent application data in the DJKI annual report above, patent applications in Indonesian territory have increased, but patent applications made by foreign nationals (abroad) in Indonesia are much higher when compared to patent applications made by domestic, especially in applications using the Patent Cooperation Treaty (PCT) facility. Referring to the Utrecht Theory of Legal Certainty, the Patent Law has provided adequate legal protection for foreign inventors so that foreign inventors are willing to register their patents in Indonesia and in line with the increase in patent applications made by foreign nationals in Indonesia, even though patent applications in 2020 decreased quite sharply by 2,483 applications from 2019.

The main factor triggering the decline in patent registration applications in 2020 was the Covid-19 pandemic situation. On April 3, 2020, the Government of Indonesia through the Minister of Health of the Republic of Indonesia issued Regulation of the Minister of Health of the Republic of Indonesia Number 9 of 2020 concerning Guidelines for Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (COVID-19) and through the Minister of Law and Human Rights issued Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 11 of 2020 concerning the Temporary Ban on Foreigners from Entering the Territory of the Republic of Indonesia has an impact on reducing production costs, human resources, and the realization of the business plan of companies that have been active patent applicants or holders in Indonesia, and on the other hand, companies are also more vigilant, streamline budgets, and filter more by choosing which inventions are considered necessary to submit registration Furthermore, it is used in the implementation of business plans, both inventions in the form of products and methods of making products.

Based on these reasons, the decline in patent applications that occurred in 2020 does not show the country's shortcomings in providing legal certainty contained in the applicable Patent Law in Indonesia, despite violations in business ethics and patent piracy, the Patent Law has accommodated this by providing sanctions as stated in Chapter XVII on Criminal Provisions.

However, even if foreign patent registration applications in 2020 declined, the legal protection provided by the state must still be implemented properly regardless of the quantitative decline in patent registration.

Based on data from the Directorate General of Intellectual Property Annual Report, the number of patent applications from 2016 to 2019 has increased on average every year, but the number of domestic patent applications does not reach half of foreign patent applications which on average per year reaches around 7,000 patents. This means that foreign inventors are more responsive in registering their intellectual works compared to domestic applicants and / or the Indonesian people do not have the ability to create an innovation in the field of technology and it can be seen that Indonesia has not played much role and contributed in accelerating the mastery of the latest technology. With the transfer of technology, it is very useful to support and improve the ability of the nation's children, especially in terms of patents.

Karena dengan dorongan kemajuan teknologi yang semakin pesat yang terjadi saat ini, negara juga harus memiliki suatu strategi untuk membantu meningkatkan kemampuan anak-anak bangsa, hal tersebut sejalan dengan teori kemanfaatan hukum menurut Jeremy Bentham karena Undang-Undang Paten telah memberikan tujuan hukum yang dicita-citakan oleh masyarakat Indonesia dengan mewajibkan inventor harus membuat produk atau menggunakan proses di Indonesia dengan menunjang transfer teknologi, penyerapan investasi dan/atau penyediaan lapangan kerja sehingga hal tersebut memberikan manfaat bagi kepentingan nasional dan meningkatkan kemampuan serta kompetensi para tenaga kerja lokal untuk dapat setara dengan tenaga kerja asing.

Technology transfer which is a trigger factor for economic development in Indonesia if removed in accordance with the Job Creation Law will have a negative impact on human resources in Indonesia because technology transfer is very important and has great benefits in improving the quality and quantity of human resource performance in order to be able to understand and develop innovations to compete with developed countries. Article 20 is considered discriminatory against foreign patent applicants by considering the provisions in Article 27 paragraph (1) of TRIP's Agreement, namely patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced. Based on TRIP's content, it is interpreted that patents must be available and patent rights enjoyed without discrimination with regard to the place of discovery, the field of technology and whether the product is imported or produced at the local level.

The view that Article 20 of the 2016 Patent Law is not in line with the provisions contained in TRIP's, must be traced to legal principles or principles in Indonesia including:

1. Intellectual Property Rights (Patents) as exclusive rights for inventors cannot be fully enforced because excessive exploitation of exclusive rights through Intellectual Property Rights (patents) can cause social injustice;
2. The principles or principles adopted and underlying the protection arrangements in the Patent Law can be the basis for the implementation of patents for the public interest, namely the principle of benefit, rational principle, sustainable principle, fair principle, and welfare principle which can be a justification that it is appropriate if the patent holder implements his patent in Indonesia and must provide benefits through technology transfer, investment, or employment;

3. Article 27 of TRIP's which states that no discrimination is a difference in treatment between citizens, does not mention the issue of technology transfer of the product. The regulation of trade relations for all WTO member countries is known as the Most Favoured Nations Treatment (MFN) principle, which is a principle that emphasizes equal treatment for all WTO member countries, and the principle of National Treatment (NT), which is the main principle that forms the foundation framework of GATT known as Non Discrimination principles, which prohibits discrimination among WTO member countries. So that concessions granted to one trading partner country must apply to all other countries, must not be treated better or worse than other countries.

States basically do not have the obligation to obey absolutely an international treaty including TRIP's Agreement, because the state has sovereignty, in this case the sovereignty in question is internal sovereignty. TRIP's provisions have flexibility for States to be able to achieve national interests, especially that Article 7 of TRIP's states that Intellectual Property Rights (Patents) must be able to provide benefits for innovation, technology transfer, and technology dissemination by taking into account the balanced interests between technology producers and users by supporting social and economic welfare and balancing rights and obligations. The state in making a policy should consider the principles of justice and expediency so that it is able to absorb the wants and / or needs of its community and be able to balance between the policies made with what can support benefits for the community.

Based on the theory of justice, according to John Rawls, making a policy or regulation is very important to pay attention to the theory of justice that pays attention to the balance between the interests of patent holders (in this study, namely foreign nationals) with the interests of the Indonesian people as developing countries who still need technology transfer from developed countries so that the economic gap in developing countries does not drag on because of the mutual benefits that can be created from the laws in force in Indonesia. Patent Law Number 13 of 2016 has provided adequate justice between inventors and the interests of the Indonesian people, so that Foreign Nationals can enjoy their rights as long as the patent still gets legal protection and the Indonesian people can enjoy benefits from the transfer of technology and the opening of job opportunities which have an impact on the unemployment rate in Indonesia is decreasing.

Law formers become one of the important elements when creating a number of policies and regulations that will be enforced in society so that the law born from their hands seems to be a picture of a legal system desired by the Government and by the community, this demand is in line with what Jeremy Bentham's aspirations have aspired to, namely "the aim of law is the greatest happiness for the greatest number" that the law must act as a tool that can Provide great happiness and benefit to many people. Based on Jeremy Bentham's theory, Patent Law Number 13 of 2016 has provided adequate legal benefits for the national interest, so that Indonesian citizens also feel the benefits of the presence of patents registered by foreign nationals in Indonesia with the creation of good welfare and a decent life for Indonesian citizens.

The birth of the Job Creation Law, by changing the provisions in Article 20 of the Patent Law which requires technology transfer for patent holders in Indonesia, is considered not in line with Article 28 C paragraph (1) of the Constitution of the Republic of Indonesia Year 1945, considering that based on the Annual Report of the Directorate General of

Intellectual Property patent applications for the period 2016 to 2020 when the Job Creation Law was born, there were no changes that significant regarding the number of patent applications, although in 2020 there was a decrease in patent applications, there has been no data that proves the reluctance of foreign inventors in implementing the Patent Law which requires the manufacture of products or using processes in Indonesia that support technology transfer, investment absorption and/or employment provision.

CONCLUSION

Based on the discussion of the three problems in this study, it is concluded as follows:

1. The development of invention registration from Foreign Nationals at the Directorate General of Intellectual Property in the period 2016 to 2020, namely in 2017 patent registration increased by 43% from 2016, in 2018 patent registration increased by 25% from 2017, in 2019 patent registration increased by 68% from 2018, while in 2020 patent registration decreased by 25% from 2019. The decline in patent registration in 2020 does not indicate any legal uncertainty contained in the Patent Law in Indonesia, but due to the Covid-19 pandemic situation experienced by the whole world which has an impact on the difficulty of active patent holders in Indonesia to realize plans and the discovery of violations of business ethics and piracy crimes against Intellectual Property Rights in Indonesia where these violations have been accommodated by Patent Law as stated in Chapter XVII on Criminal Provisions.
2. The benefits for economic growth in Indonesia by providing legal protection for the invention of Foreign Nationals in Indonesian territory are increasing the confidence of foreign nationals to want to register their patents in Indonesia, providing benefits in building the Indonesian economy as a developing country because of the opening of jobs that have an impact on reducing unemployment in Indonesia, knowledge and skills that can be utilized by the community Indonesia because of technology transfer. This is in line with building a positive image of the Government of Indonesia because it is considered successful in providing legal certainty.
3. The legal implication of the enactment of Law of the Republic of Indonesia Number 11 of 2020 concerning Job Creation on the Patent Law, especially with regard to the granting of patents on inventions of foreign nationals in Indonesia is the elimination of the obligation to carry out technology transfer not in accordance with Article 28C paragraph (1) of the Constitution of the Republic of Indonesia as the ideals and objectives of the formation of the state, namely the right to develop themselves through fulfilling their basic needs, receive education, and benefit from science and technology, art and culture in order to improve the quality of life and for the welfare of mankind and the content of the 5th Precept of Pancasila, namely Social Justice for All Indonesian People. to be able to develop himself to improve the quality of life. Article 20 of the Patent Law which is considered not in accordance with the provisions contained in TRIP's Agreement needs to be explored because basically TRIP's provides flexibility for countries in improving skills in technology so that there is an economic improvement in the country. By removing the provisions in Article 20 of the Patent Law, it is considered that it will create inconsistencies with other regulations in the pharmaceutical sector, even against the Regulation of the Minister of Law and Human Rights of the Republic

of Indonesia Number 30 of 2019 concerning Procedures for Granting Compulsory Patent Licenses which accommodates the difficulties of Foreign Nationals in fulfilling Article 20 of the Patent Law, namely if the patent holder has not been able to exercise his patent in Indonesia, then the patent holder can delay the implementation of the manufacture of products or the use of patent processes in Indonesia to be able to develop himself to improve the quality of life. Article 20 of the Patent Law which is considered not in accordance with the provisions contained in TRIP's Agreement needs to be explored because basically TRIP's provides flexibility for countries in improving skills in technology so that there is an economic improvement in the country. By removing the provisions in Article 20 of the Patent Law, it is considered that it will create inconsistencies with other regulations in the pharmaceutical sector, even against the Regulation of the Minister of Law and Human Rights of the Republic of Indonesia Number 30 of 2019 concerning Procedures for Granting Compulsory Patent Licenses which accommodates the difficulties of Foreign Nationals in fulfilling Article 20 of the Patent Law, namely if the patent holder has not been able to exercise his patent in Indonesia, Then the patent holder can delay the implementation of the manufacture of the product or the use of the patent process in Indonesia for a maximum period of 5 (five) years by submitting an application to the Minister along with the reasons.

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